ANTHONY HULJEV

IBLA 2000-114 Decided April 3, 2000

Appeal from a decision of the California State Office, Bureau of Land Management, approving land exchange. CACA 31270.

Decision affirmed; petition for stay denied as moot.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

BLM may dispose of lands by exchange under section 206(a) of FLPMA, 43 U.S.C. ' 1716(a) (1994), where it determines that the public interest will be well served by making that exchange. BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination. A decision approving a land exchange will be affirmed where BLM found that the exchange will result in more logical and efficient management of the BLM lands in the area, was in accordance with existing land-use planning documents, and would provide significant benefits to the public for general recreation, wilderness management, riparian resources, and cultural resources, and where that finding is not successfully challenged on appeal. BLM's decision is properly affirmed where the loss of recreational use of the selected parcel was balanced by the gain of recreational use on the acquired lands and this loss was minimal, due to the availability of other lands near the selected parcel providing superior recreational values.

APPEARANCES: Anthony Huljev, pro se; Ron Fellows, Bakersfield, California, Field Office, U.S. Department of the Interior, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Anthony Huljev (Appellant) has appealed from the December 21, 1999, decision of the California State Office, Bureau of Land Management (BLM),

approving Phase 3 of a land exchange with The Nature Conservancy (TNC). Appellant also requested a stay of the effect of BLM's decision pending our consideration of his appeal. 1/

The background of the dispute is set out in BLM's decision denying Appellant's protest:

> In January 1993, [BLM] and [TNC] signed an agreement to initiate a land exchange. The private lands proposed by TNC for exchange are located in the Kern River Valley; the public land proposed for transfer to TNC is a scattered tract known as Tract #1 located near the town of Kernville, California, which in the Caliente Resource Management Plan (CRMP), has been found suitable for disposal. The purpose of the exchange is to reduce the number of scattered BLM tracts, to consolidate the BLM lands for more efficient management, and to acquire private lands within and adjacent to the Domeland Wilderness. TNC has already conveyed the wilderness land and two other environmentally sensitive parcels to the United States. Tract #1 will be used to satisfy the land debt owed for those lands already acquired from TNC. The tract of public land is legally described as: Mount Diablo Meridian, California, Kern County[,] T. 25 S., R. 33 E., sec. 15, lots 32, 33, 35, 41, 43, 44, 45, 46, 47, and 48. 62.19 acres
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> A Notice of Decision (NOD) was issued on September 3, 1998, then published in the Kern Valley Sun newspaper, notifying the public of the decision of [BLM] to approve the exchange with TNC involving Tract #1. A 45-day comment period invited written comments from interested parties. On October 15, 1998, the BLM Bakersfield Field Manager received a letter from you [(Huljev)] in which you objected to the exchange of BLM Tract #1 with TNC. The concerns raised in opposition to the disposal of Tract #1 focused on (1) the frequent use of nearby elementary school students for scientific investigation and recreation; (2) a claim of existence

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1/ Huljev's notice of appeal was filed with BLM on Jan. 27, 2000, and listed five reasons that BLM's decision to dismiss his protest was in error. His notice of appeal was accompanied by a separate request for stay setting out reasons for granting a stay. Accordingly, under the regulations, Huljev had until Feb. 28, 2000, to file additional statements of reasons or written arguments or briefs. On Feb. 7, 2000, he filed a document setting out an additional ground in support of his appeal. On Feb. 28, 2000, the Kern River Historical Society filed a document in support of Huljev's appeal. BLM filed its response to Huljev's reasons on Feb. 23, 2000. On Mar. 13, 2000, Huljev responded.

of the trailhead for the historic Mule Trail on the land; (3) daily use of the land by local horsemen, hikers, hunters and birdwatchers; and (4) BLM's responsibility to maintain open space land for public use. The following are our responses to these points:

(1) The majority of the land bordering Tract #1 on the south is owned by the Kernville Union School District. The District acquired the land from the United States in April 1967 pursuant to the Recreation and Public Purposes Act of 1926 for school and educational purposes, for development of Kernville Elementary School. Of the 21.78 acres the United States conveyed to the District, approximately 10 acres currently are not being fully utilized by the school; the lands remain undeveloped and suitable for scientific investigation and recreation. Also, the Sequoia National Forest property lies just 350 feet east of the school property and it, too, is accessible to the students for scientific and recreational opportunities via a trail right-of-way that BLM has reserved for public use across Tract #1 as an access point to the national forest.

(2) Our archaeologist/historian researched the possibility that the Harley Mine Mule Trail may have crossed Tract #1. After field inspections, diligent research, and discussions with local historians, we have determined that the most likely location of the mule trail is approximately 1/4 mile north of Tract #1. This would be a logical route, since the location of the old Harley Millsite was near the current location of Camp Owens, approximately 3/4 mile northwest of Tract #1. Our field inspections revealed no physical evidence or accessories that would be expected if, in fact, the trail was located on Tract #1. The dirt road on Tract #1 that is often referred to as the mule trail is simply an access route that connects to the trail further into the mountains on the National Forest.

(3) We have considered the recreation value of the properties to be acquired of a higher public interest than any recreation provided by Tract #1. The lands that already have been acquired in this exchange (698 acres) provide recreational opportunities for the general public in the Kern River Valley area. A 400-acre wilderness inholding, including an additional 298 acres of environmentally sensitive land has been acquired through this exchange which will provide recreational opportunities such as you describe. In addition, the national forest land is immediately adjacent to Tract #1 and to other areas of the town of Kernville. These national forest lands are available for public recreational use. The public interest will be better served by the disposal of this 62-acre parcel (Tract #1) adjacent to the town of Kernville and the acquisition of the 698 acres in other areas of the Kern River Valley.

> (4) While there is no statutory requirement for BLM to maintain open space for public use, this exchange will, in fact, accomplish the maintenance of open space in the Kern River Valley. In this instance, there is adequate open space surrounding the town of Kernville (the national forest lands) that is available for public use. The isolated nature of Tract #1 (no legal public access to the parcel exists) and its urban interface make it difficult and uneconomic for BLM to manage. The public interest is better served by exchanging this BLM land for other lands within the Kern River Valley.
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> Based on the foregoing, and the documentation contained in the case record, the notice of decision dated September 3, 1998, issued by the authorized officer of the Bureau of Land Management, Bakersfield Field Office, is in accordance with the regulations found in Title 43, Code of Federal Regulations 2200. Therefore, BLM intends to proceed with the disposal of the public parcel known as Tract #1. The public interest will be well served by completion of this exchange transaction.

(BLM Decision at 1-2.) Appellant filed a timely notice of appeal and request for stay on January 27, 2000. As a basis for his appeal, Appellant essentially reiterates the objections raised in his protest:

> (1) Tract #l provides unique recreational opportunities for residents and tourists in Kernville. Remote lands being acquired by BLM in the Kern Valley area are not readily accessible and therefore cannot be considered comparable in recreational value to the land in Tract #l. This is the most accessible government land in the Kernville area, within walking distance of the town and rafting outfitters.
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> (2) The students at Kernville Elementary school utilize all of the acreage. If this land is exchanged it will be sold and most likely developed. The student would be adversely affected by development of this land. Have the principal and teachers been questioned?
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> (3) There is evidence that the Mule Trail is indeed on Tract #l and I would suggest that the Department contact noted local historian and author Bob Powers. I also refer to Exploring the Southern Sierra, East Side, and a book that mentions the trail several times.
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> (4) This is not an isolated inaccessible parcel. There is public access to the parcel and on any given day autos can be seen driving up into the property. The public interest is not being served by eliminating this land. I would suggest

> that the BLM and the Forest service write a Memo of Understanding whereby the Forest Service would be responsible for the tract's management since Tract #l is immediately adjacent to Forest Service land.

In his petition for stay, Appellant submits that, if the stay is denied there will not be sufficient time for additional inquiry into his objections, since the exchange would proceed. Further, he asserts that, since TNC plans to sell the land (likely to developers), evidence in the field would be lost, resulting in irreparable harm to the community. He alludes to a "petition with nearly 500 signatures (1/3) of the population of Kernville indicating the public's objection to the exchange," which (he asserts) has been ignored by BLM and which shows that the public interest favors a stay of this decision.

By memorandum to this Board dated February 7, 2000 (a copy of which was duly served on Appellant as required by 43 C.F.R. ' 4.22(b)), BLM responded that its decision was supported by Environmental Assessment (EA) No. CA-016-96-034 for the Allen Land Exchange - Phase 3 and accompanying Finding of No Significant Impact. It argues that the exchange, in addition to being supported by those documents, is consistent with BLM planning recommendations outlined in the Caliente Resource Management Plan approved by the California State Director on May 5, 1997, and the Allen Land Exchange Feasibility Report approved on March 3, 1993. It notes that the latter "plan addresses land tenure adjustment both in terms of planning area policy statements as well as specific management decisions for the entire management area and identifies the subject parcel as suitable for potential exchange, subject to a site-specific EA" and "lays out the public benefits that will be gained by completing the exchange." It summarizes those benefits as follows:

> The BLM Bakersfield Field Office manages many isolated parcels of BLM land over a six-county area in central California. One of the major goals of the Caliente Resource Management Plan is land tenure adjustment, or the "repositioning" of most of the scattered BLM parcels through land exchanges. This will lessen the administrative burden on BLM, make more acreage accessible to the public, and create opportunities to acquire private lands with important recreational, cultural, and biological resources.

BLM notes that the 60-acre parcel "is bounded on the north and east by Federal lands in the Sequoia National Forest, and on the west and south by private residences and Kernville Elementary School," and that it "has physical access from Kernville Elementary School, but has no legal access via a BLM-acquired easement or by a dedicated public road or trail." BLM

also notes that the parcel has been subjected to "unauthorized use, dumping, and human-caused wildfires," making it "difficult and expensive to manage." 2/ BLM states as follows concerning the land exchange at issue herein:

> This exchange is part of an "assembled land exchange" which consists of an assemblage of multiple parcels of Federal and non-Federal lands consolidated into a package for the purpose of completing one or more exchange transactions with TNC until the Allen Exchange is completed. The private parcels (698 acres) have been in Federal ownership since December 1996 when TNC conveyed three separate parcels of private land to the United States to complete the private land side of the exchange transaction.

BLM describes the "private parcels," that is, the lands deeded to the United States by TNC in exchange for Parcel #1 and other lands, as follows:

> These private lands are located in Kelso Valley near the town of Onyx, approximately 20 miles southeast of the public land parcel (BLM Parcel #1). One of the private parcels is an inholding within the Domeland Wilderness (400 acres) which attaches to an existing block of BLM land. The other two parcels (298 acres) attach to an existing block of BLM land in Kelso Valley with public access. One of these parcels has a significant riparian zone.

BLM notes that, following the transfer of ownership of the private lands from TNC to the United States, it "has been in a 'payback' mode * * * and is now ready to convey the public land to TNC to complete the Allen exchange transaction. Utilizing BLM Parcel #1 will equalize and complete the entire Allen Land Exchange."

BLM points out that the EA recognized that development and loss of open space was a possible consequence of the exchange. It notes that the location of the old mule trail to Harley Mine was investigated by its

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2/ BLM also notes the problem of unauthorized use by surrounding landowners, for whom the tract provides a convenient "backyard" not benefitting the general public. It states that, "[i]n an effort to accommodate the desires of adjacent landowners whose property borders that of BLM Parcel #1, a re-survey of Parcel #1 in 1998 by BLM cadastral surveyors created four small lots (44 to 47) since the adjacent landowners desire to acquire these small lots to add to their backyards." Title to those lots would presumably be acquired from TNC after the completion of the exchange. Although Appellant suggests that this arrangement somehow improperly discouraged neighboring parties from protesting the exchange, the legality of that feature of BLM's action is not under challenge herein.

archaeologist, who determined that the likely location of the old trail was north of the BLM parcel and that the existing "trail" (actually an unimproved road) on the BLM parcel was simply a road of convenience onto the Sequoia National Forest lands to the east. BLM advises that the school district and school principal were contacted concerning the exchange, and it appears that they advised BLM that use of the BLM parcel by the school was incidental and that the school has several acres of still-undeveloped land acquired from BLM in the 1960's adjacent to the school. Although they "recognized" some recreational use of the parcel by the public, BLM apparently did not regard the lands as presenting "unique recreational opportunities" to the school, in light of the presence of existing National Forest lands within 0.5 to 1.5 miles providing a much larger area for recreation than does BLM parcel #1.

BLM asserts that disposing of Parcel #1 will not eliminate or remove the only public lands for recreational activities, as there are thousands of acres in the adjacent Sequoia National Forest available for recreational use. BLM notes that a right-of-way for a hiking trail giving access to adjacent Sequoia National Forest lands was reserved over the southernmost portion of the BLM parcel. The Forest Service letter of July 24, 1996, encouraged BLM's establishment of a reserved right-of-way to access adjacent National Forest lands.

BLM summarizes its reasons for proceeding with the exchange by noting that the "benefit derived from exchanging the landlocked BLM Parcel #1 is directly applied toward acquiring larger, contiguous parcels with the purpose of greatly enhancing wilderness conservation, wildlife management, recreational opportunities, and quality of life for the greater public good." BLM points out that Appellant has never submitted his petition to BLM, nor have any of the signers of the petition ever contacted BLM. BLM decided that the public interest would be better served by completing the exchange than by maintaining this isolated parcel of BLM land with its urban interface.

BLM also points out that Appellant does not explain how a denial of the petition for stay will adversely affect him. Nor does he explain how BLM's decision adversely affects him. BLM notes that there is no evidence that Appellant resides in the Kernville area, and that it appears instead that he resides in Venice, California, in the Los Angeles area.

On February 7, 2000, Appellant supplemented the reasons for appeal set out in his notice of appeal, noting that he did not believe that there has been a Native American Consultation for Tract #1, and presenting evidence showing that the mule trail begins behind the James Store in Kernville on Tract #1. This was again supplemented on February 24, 2000, by the filing of a copy of a book and article showing that the old mule trail to the Harley Mine begins on Tract #1.

On February 24, 2000, BLM responded to Appellant's supplemental reasons, noting that it did in fact perform a Native American consultation by

contacting Native American representatives, as shown in the EA, but no comments were received. BLM elected to stand on its previous explanation concerning the presence of the mule trail.

Finally, on March 13, 2000, Appellant submitted another document, including a copy of the 1994 petition signed by residents opposed to the "assembled land exchange" of which BLM's present action is the last step. He questions the significance of the failure of other landholders to protest BLM's proposed decision, noting that they had been given the opportunity to purchase small "backyard" areas from TNC in return for their promises not to further protest the exchange. He also observes that he did not become aware of the land exchange until 1997 and claims that notice of the BLM's intent to enter into an exchange should have been published in the Los Angeles area.

Since our consideration of the request for stay necessarily involves review of the merits of this matter, we have elected to expedite the matter on our own motion and issue a dispositive adjudication. We conclude that BLM's decision should be affirmed on the merits.

[1] Section 206(a) of the Federal Land Policy and Management Act of 1976 (FLPMA) provides:

> A tract of public land or interests therein may be disposed of by exchange by the [Secretary of the Interior] under this Act * * * where the Secretary * * * determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary * * * shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary * * * finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. ' 1716(a) (1994). In deciding what is in the public interest, BLM, as the authorized officer of the Department, is required to fully consider

> the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient

> management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that * * * [t]he intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. ' 2200.0-6(b); Donna Charpied, 150 IBLA 314, 331-32 (appeals filed, National Parks and Conservation Ass'n v. BLM, No. EDCV 99-0041 VAP (JWJx) (C.D. Ca.); Donna Charpied, et al. v. USDI; No. EDCV 99-0454 RT(MCx) (C.D. Ca.)); see City of Santa Fe, 103 IBLA 397, 399-400 (1988).

While BLM is required to consider this diverse range of factors in determining whether the public interest will be well served by the exchange, it has discretion to decide how to balance all of the statutory factors when making a public interest determination. Donna Charpied, 150 IBLA at 332; see National Coal Ass'n v. Hodel, 825 F.2d 523, 532 (D.C. Cir. 1987); Lodge Tower Condominium v. Lodge Properties, Inc., 880 F. Supp. 1370, 1380 (D. Colo. 1995); National Coal Ass'n v. Hodel, 675 F. Supp. 1231, 1245 (D. Mont. 1987), aff'd, 874 F.2d 661 (9th Cir. 1989); Burton A. McGregor, 119 IBLA 95, 103 (1991); John S. Peck, 114 IBLA 393, 397 (1990). We hold that BLM has properly exercised that discretion herein.

BLM's stated rationale for approving this exchange was set out as follows in its Decision Record:

> The exchange meets the public interest criteria in 43 CFR 2200.0-6. The subject BLM tract is an isolated BLM parcel that is difficult to manage and lacks public or administrative access. In addition, it lies near downtown Kernville, [California,] and has considerable urban interface, which further complicates its management. Due to its urban interface, it has had problems with encroachment and human-caused wildfires in the past, and it is likely to continue having these problems in the future if the tract remains in Federal ownership. Exchange of Tract #1 will result in more logical and efficient management of the BLM lands in the area. Exchange of Tract #1 is in accordance with existing land-use planning documents. The exchange would provide significant benefits to the public for general recreation, wilderness management, riparian resources, and cultural resources. Tradeoffs for other resources would be roughly equal. The exchange would help add significant acreage to the Domelands Wilderness. No significant impacts to the socio-economic aspects of the local

> community are expected. The Forest Service does not desire to acquire Tract #1, and believes that the parcel is ideally suited for any future expansion needs of Kernville. The resource values of the Federal land to be exchanged are not more than the resource values of the non-Federal lands that have been acquired. The intended future use of the Federal lands is not expected to significantly conflict with the established management objectives on adjacent Federal lands (Sequoia National Forest).
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> The mineral report concludes that the subject tract has some geothermal development potential, but it is not recommended that the geothermal estate be retained for the following reasons: 1) the prospective future use of the tract is residential or commercial expansion for the town of Kernville[;] 2) retention of geothermal rights could severely interfere with such future surface developments[;] 3) there are no geothermal developments in the area[; and] 4) any geothermal value in the parcel would be overwhelmingly outweighed by its surface value. There are no hazardous materials concerns on the subject tract. The resource values and objectives for the BLM lands to be disposed of are not more than the values and objectives of the private lands to be acquired.

Despite BLM's assertions that it cannot find evidence of the trail on Parcel #1, we are persuaded by Appellant's evidence that the trail has been used in the past by the public crossing the lands covered by Parcel #1. It is logical that one branch of the trail ended at the center of town and that access to the trail would be perpetuated from that point. The topographic maps in the record plainly show a trail heading northeast across Parcel #1 from behind the James Store. The description in Exploring the Southern Sierra East Side, presented on appeal by Appellant, refers to reaching the mule trail via that route. 3/ However, the mule trail is equally accessible, as BLM found, from Camp Owens and other points to the west. The maps in the record evince no significant topographic feature that bars such access or renders it any more difficult than access from across Parcel #1.

3/ The topographic map indicates that a person accessing the trail from the south across Parcel #1 would have to climb one of two steep drainages beginning at the northernmost portion of the parcel. This is borne out by the description of the climb to Harley Mine in Exploring the Southern Sierra East Side. The access from the west is slightly longer, but not as steep. It also appears that the access from Camp Owens lies entirely across National Forest lands, whereas it is necessary to cross private lands to gain access from the main road to the trail behind the James Store.

As a legal matter, Appellant's objections go to whether BLM properly balanced the resource values to be lost by the deeding of Federally-owned lands against the values to be gained from those acquired via the exchange. Giving up Parcel #1 would result in the loss of one access to the trail leading to the Harley Millsite, as well as the recreational use of Parcel #1 itself. However, this loss was balanced by the gain of recreational use on the acquired lands; further, it is minimal, due to the availability of other lands near to Tract #1 providing superior recreational values.

We find that BLM, in considering whether the public interest would be well served by making this exchange within the meaning of section 206(a) of FLPMA, properly considered whether Federal land management would be improved by approving it. Although it appears that landowners surrounding Tract #1 have not actively barred access across their lands to the public seeking to use the tract, the tract is nevertheless landlocked: There is no legal access of record to it from the west or south, and there are no roads to the north or east. The record contains evidence that surrounding landholders have been using the parcel in trespass and that it is serving as a dumping ground for trash. In lieu of attempting to resolve and prevent these unauthorized uses, a time-consuming procedure that can only alienate local residents, BLM has elected to exchange the parcel for other lands of equal value 4/ that are unquestionably less burdensome for it to manage.

It is no bar to the exchange that the lands in Tract #1 may be developed following exchange. The governing Act and regulations expressly recognized community expansion as a favorable consideration in assessing whether an exchange is in the public interest.

Appellant's other objections to the exchange (that neighboring landowners, the local school, the Forest Service, or Native Americans might find it objectionable) have been fully resolved by BLM. The record amply establishes that these parties either do not object to the exchange or have elected not to participate further in BLM's decision-making process. 5/ As a result, it is unnecessary to address whether Appellant has standing to represent these parties' interests.

4/ Section 206(b) of FLPMA, supra, requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value, failing in which the BLM appraisal is properly upheld. Appellant has not challenged BLM's valuation in this case.

5/ Appellant has provided nothing to support his contention that BLM was required to publish notice of the exchange in the Los Angeles area.

The record shows that BLM carefully evaluated the controlling question whether determining whether the public interest will be well served by the exchange. Appellant has failed to show that BLM improperly exercised its discretion in deciding that the exchange should proceed. To the extent not specifically addressed herein, Appellant's arguments have been considered and rejected.

In view of our holding that BLM's decision is affirmed, the pending request for stay is denied as moot.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision appealed from is affirmed, and the request for stay is denied.

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David L. Hughes
Administrative Judge

I concur:

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R.W. Mullen
Administrative Judge